(4)

Supreme Court, U.S.
FILED
FEB 19 2003
OFFICE OF THE CLERK

No. 02-858

IN THE

Supreme Court of the United States

WORLDCOM, INC., AT&T CORP., AND
COVAD COMMUNICATIONS COMPANY,
Petitioners,

v.

UNITED STATES TELECOM ASSOCIATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

---

REPLY BRIEF OF PETITIONERS

WILLIAM SINGLE, IV
WORLDCOM, INC.
1133 19th Street, N.W.
Washington, D.C. 20036
(202) 736-6096

MARK D. SCHNEIDER *
DONALD B. VERRILLI, JR.
MICHAEL B. DESANCTIS
JENNER & BLOCK, LLC
601 13th Street, N.W.
Washington, D.C. 20005
(202) 639-6000

Counsel for Petitioner WorldCom, Inc.

* *Counsel of Record*

[Additional Counsel Listed on Inside Cover]

February 18, 2003

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

8 pp

MARK C. ROSENBLUM
LAWRENCE J. LAFARO
RICHARD H. RUBIN
AT&T CORP.
900 Route 202/206 North
Bedminster, NJ 07921
(908) 532-1750

DAVID W. CARPENTER
SIDLEY AUSTIN BROWN
& WOOD
Bank One Plaza
10 South Dearborn Street
Chicago, IL 60603
(312) 857-7000

Counsel for Petitioner AT&T Corp.

JASON D. OXMAN
COVAD COMMUNICATIONS
COMPANY
600 14th Street, N.W.
Suite 750
Washington, D.C. 20005
(202) 220-0400

Counsel for Petitioner Covad Communications Company

The Federal Communications Commission ("FCC") agrees that the decision below is "erroneous," is in "significant tension" with this Court's previous decisions implementing the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151-276 ("1996 Act" or "Act"), and concerns matters of critical national importance. *See* Brief of Federal Respondents, No. 02-858 at 15 (U.S. filed Feb. 2003) ("FCC Brief"). It nevertheless opposes review on the ground that it construes the decision below merely to impose on the Commission certain achievable evidentiary and explanatory burdens with respect to issues which, as a matter of discretion, the Commission already had begun to consider in its pending *Triennial Review* proceeding.[1] *See* FCC Brief at 18. On that construction of the decision below, the Commission concludes that in the pending *Triennial Review* proceeding, it will be able to "articulate its current understanding of the legal and policy questions bearing on network element unbundling" without being unduly constrained by the decision below. *Id.* at 19. For that reason, it takes the position that review "at this time" would not be an efficient use of judicial resources. *Id.*

In like fashion, the incumbent carrier respondents assert that the decision below does not bind the FCC to any particular course of action in the *Triennial Review* proceedings, but rather "rests in large part on the court's conclusion that the FCC had not considered relevant factors or sufficiently explained its judgments." Brief for Respondents BellSouth, Qwest, SBC, Verizon, and USTA in Opposition, No. 02-858 at 19 (U.S. filed Feb. 5, 2003) ("Incumbents' Brief").

1/ *See* Notice of Proposed Rulemaking, *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 16 FCC Rcd 22781 (2001) ("Triennial Review").

If that view of the decision below were undisputed and indisputable, we would concur that review would be unnecessary.

But the incumbents elsewhere have offered a radically different construction of the decision below that would impose highly restrictive limitations on the authority of the FCC, and of state commissions who ultimately are charged with implementing the 1996 Act's unbundling obligations. Indeed, in the *Triennial Review* proceeding itself, the incumbents have taken the position that the decision below did far more than impose achievable evidentiary and explanatory burdens. They claim instead that it also required the FCC, as a matter of law, to adopt rules that embrace an economic theory of unbundling that, as a practical matter, would greatly limit competitive access to the incumbents' network facilities.

Respondent Verizon, for example, argued to the FCC that "[t]he impairment inquiry therefore *must*, as the D.C. Circuit held, be 'linked (in some degree) to natural monopoly' characteristics of an element. To put it in economic terms, an element may be unbundled under the statute when, in the D.C. Circuit's words, 'it would make no economic sense for competitors to duplicate the facility.'" Ex parte Letter from William Barr to Chairman Powell, CC Docket No. 01-338 at 3 (FCC Oct. 16, 2002) (emphasis added). In the same submission, Verizon further maintained that "[a]s the D.C. Circuit made clear, the Commission *may not* interpret impairment by reference to cost disadvantages inherent in entry itself." *Id.* (emphasis added). *See also id.* at 4 ("the D.C. Circuit said that the Commission *must* pin its UNE determination on 'characteristics that would make genuinely competitive provision of an element's function wasteful'" (emphasis added)); *id.* at 7 (FCC's prior presumption that

"more unbundling [is] better . . . *cannot* survive the D.C. Circuit's decision, which *compels* the opposite presumption" (emphasis added)); *id.* at 8 ("The D.C. Circuit's decision *requires* the Commission to base its unbundling rules on 'market-specific variations in competitive impairment'" (emphasis added)); *id.* at 9 ("As the D.C. Circuit held, *the Act does not permit* a universal 'finding of material impairment where the element in question – though not literally ubiquitous – is significantly deployed on a competitive basis' in some geographic markets." (emphasis added)). The other incumbent respondents likewise have argued in the *Triennial Review* that the D.C. Circuit's decision narrowly cabins the ability of the FCC and state commissions to order the unbundling of specific elements.[2]

2/ *See, e.g.*, Reply Comments of SBC Communications, Inc., CC Docket No. 01-338 at 60 (FCC filed July 17, 2002) ("The D.C. Circuit has now made clear that [permitting unbundling in certain markets] *is reversible error*" (emphasis added)); *id.* at 9 (D.C. Circuit's decision "mandate[s]" the view of the Act "that SBC described in its opening comments"); *id.* at 67 (under D.C. Circuit's decision, "the Commission *must* adopt a more granular analysis of when to order unbundling" (emphasis supplied by SBC)); *id.* at 111 (D.C. Circuit's decision forecloses unbundling of the UNE known as the High-Frequency Portion of the Loop (HFPL)); Reply Comments of Qwest Communications Int'l, Inc., CC Docket No. 01-338 at 4 (FCC filed July 17, 2002) ("Faithful application of the court's [D.C. Circuit's] holdings to the record in this proceeding *compels a significant reduction in the scope of the unbundling requirements*" (emphasis added)); *id.* at 2 (D.C. Circuit's decision "made clear that the Commission should reject the CLECs' entreaties"); *id.* (under D.C. Circuit's decision, FCC "cannot adopt" unbundling rules that make UNEs available in certain markets); *id.* at 3 (under D.C. Circuit's decision, "Commission may not find impairment on the basis of cost disparities"); Reply Comments of BellSouth Corp., CC Docket No. 01-338 at 61 (FCC filed July 17, 2002) (under D.C. Circuit's decision, "cost alone is not sufficient to prove impairment"); *id.* at 3 (under D.C. Circuit decision FCC, "in order to comply with statutory intent . . . must take into account actual market data . . . .").

Thus, contrary to what the incumbents have argued here in an effort to defeat *certiorari*, *see* Incumbents' Brief at 15-19, they and the FCC hold radically divergent and incompatible views with respect to what rules the FCC lawfully may adopt in the *Triennial Review*. Indeed, the legal uncertainty created by the decision below may have taken even a larger toll on the Commission's internal deliberations than it was able to predict: as of this writing, the FCC's *Triennial Review* proceedings reportedly are in disarray, with the Commission so deeply divided as to be unable to reach a conclusion.[3]

The continuing dispute over the meaning of the decision below (unless resolved here) will be a continuing source of confusion and litigation in the courts of appeals on review of the Triennial Review, and in federal district courts in scores of cases brought under section 252 of the 1996 Act concerning the scope of the incumbents' unbundling obligations.[4] Such confusion similarly will impact state commissions to the extent they are called upon to implement unbundling rules faithful to the inconsistent dictates of this Court's decisions, the decision below, and the rules that ultimately result from the *Triennial Review* proceeding.

3/ *See, e.g.*, Christopher Stern, *FCC Vote on Phone Competition Delayed*, WASH. POST, Feb. 13, 2003, at E01.

4/ Disputes over the way the D.C. Circuit's decision will impact subsequent challenges to the FCC's *Triennial Review* order already have begun. *See* Ex parte Letter from Gary L. Phillips and R. Steven Davis to Chairman Powell, CC Docket No. 01-338 at 1 (FCC filed Feb. 12, 2003) ("Phillips Letter") (arguing that adoption of the state commissions' unbundling proposal would conflict with the D.C. Circuit's decision and "virtually guarantee yet another legal reversal and prolong the uncertainty that is plaguing the industry and the economy").

It follows that the concerns of judicial and administrative efficiency which the FCC invokes strongly counsel for a *grant* of this petition, and not for denial. Absent the Court's resolution of the parties' fundamentally conflicting views of the law, the legal uncertainty that has delayed the full implementation of the 1996 Act since its inception will continue unabated for at least another two years, until judicial review of the *Triennial Review* itself is completed.

As long as that paralyzing uncertainty persists, Congress's primary goal of introducing vibrant competition in the nation's local telephone markets "as quickly as possible" will be frustrated. *See* H.R. Rep. No. 104-204 at 89 (1995) ("H. Rep."); *Verizon Communications Inc. v. FCC*, 122 S. Ct. 1646, 1661 (explaining that Congress intended the 1996 Act to "jump-start" competition that otherwise would be slow to emerge).[5] This Court has recognized that Congress viewed the rapid onset of meaningful competition in local telephone markets as "an end in itself." *Id.* at 1654. Review of this decision is critically necessary so that this legislative command does not continue to be frustrated.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

5/ The incumbent respondents have acknowledged the same problem before the FCC in the *Triennial Review*. *See* Phillips Letter at 1 ("for the last seven years, the industry has labored under a cloud of uncertainty, with ILECs and CLECs alike hampered in their ability to make investment decisions and launch strategic initiatives by the absence of lawful, predictable unbundling rules").

WILLIAM SINGLE, IV
WORLDCOM, INC.
1133 19th Street, N.W.
Washington, D.C. 20036
(202) 736-6096

MARK D. SCHNEIDER*
DONALD B. VERRILLI, JR.
MICHAEL B. DESANCTIS
JENNER & BLOCK, LLC
601 13th Street, N.W.
Washington, D.C. 20005
(202) 639-6000

Counsel for Petitioner WorldCom, Inc.

MARK C. ROSENBLUM
LAWRENCE J. LAFARO
RICHARD H. RUBIN
AT&T CORP.
900 Route 202/206 North
Bedminster, NJ 07921
(908) 532-1750

DAVID W. CARPENTER
SIDLEY AUSTIN BROWN & WOOD
Bank One Plaza
10 South Dearborn Street
Chicago, IL 60603
(312) 857-7000

Counsel for Petitioner AT&T Corp.

JASON D. OXMAN
COVAD COMMUNICATIONS COMPANY
600 14th Street, N.W.
Suite 750
Washington, D.C. 20005
(202) 220-0400

Counsel for Petitioner Covad Communications Company

* *Counsel of Record*

February 18, 2003